NO. 45602-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ERIN THOMAS MITCHELL BONG,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's constitutional rights to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it admitted the recording of a 911 call into evidence because it was testimonial in nature and the person who placed the call testified she had no memory of making it.

2. The trial court erred when it admitted a medical record into evidence under ER 803(a)(4) because it contained statements not made for the purpose of medical diagnosis.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's constitutional rights to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it admits a recording of a 911 call into evidence when it was testimonial in nature and the person who placed the call testifies that she has no memory of making it?

2. Does a trial court err if it admits a medical record into evidence under ER 804(a)(4) when that record contains statements not made for the purpose of medical diagnosis?

STATEMENT OF THE CASE

Factual History

In May of 2013, Defendant Erin Bong and his girlfriend Melody Loudermilk were living together in a home on Olympic Street in Bremerton. RP 114-115.[1] Ms Loudermilk suffers from a number of maladies, including rheumatoid arthritis, fibromyalgia, osteopenia, depression, anxiety and anemia. RP 124. She regularly takes a number of medications such as prednisone, gabapentin, clonazepam, enbrel, and cymbalta and. RP 109-111, 124. Some of these medications should not be used with alcohol. RP 111.

During the evening of May 3rd the defendant began drinking beer and and Ms Loudermilk began drinking wine. RP 115-117. After finishing one bottle of wine by herself both Ms Loudermilk and the defendant got into an argument. *Id.* She then took two of her anti-anxiety pills. *Id.* Although she does remember that at one point the defendant grabbed her by the wrist during their continuing argument while they were in her bedroom, she doesn't remember much after that point. RP 118-119. In fact, although she has no memory of making a 911 call, just prior to 10:00 pm that evening she did call 911 claiming that the defendant "just beat me up." RP 120. She also

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[1]The record on appeal includes one volume of continuously numbered verbatim reports of the trial and sentencing hearing in this case, referred to herein as "RP [page#]."

claimed that he "stole my money and my phone," although she didn't explain how she was calling 911 if he had her phone. *See* Transcript of 911 call attached to Order Supplementing the Record, Document 49 in Supplemental Clerk's Papers.[2] She also stated that he knew that she was calling 911 and she thought he was going to "probably try to take off with my money." *Id.* She then elaborated that by "money" she meant that he had actually taken her SSI check card. *Id.* She then gave the defendant's physical description. *Id.* At this point the 911 operator terminated the call, telling Ms Loudermilk that she had summoned the police and to call back if there is a problem before the police arrived. *Id.*

At about 10:10 pm Bremerton police officer William Prouse arrived at the defendant and Ms Loudermilk's residence. RP 53-54. Upon arrival he separately spoke with the two of them, noting that both appeared slightly intoxicated. RP 53-55. He also noted that Ms Loudermilk appeared to have swelling on the right side of her cheek and that she was upset. RP 54-55. Based upon her claims he arrested the defendant. RP 57-58. During a search

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[2]In the case at bar the state played the 911 call to the jury but the court reporter did not take notes of what was said on the 911 call as it was played in court. As a result she was unable to prepare a verbatim report of this portion of the trial. The trial court later entered Document 49, which is an Order Settling the Record with an accurate transcription of the 911 call attached. Appellant included document in a Supplemental Designation of Clerk's Papers. A copy of this Supplemental Designation as filed in the Kitsap County Superior Court has been filed with this brief.

incident to arrest he found Ms Loudermilk's cell phone in the defendant's pocket. RP 58. However, he did not claim to have found her SSI payment card on the defendant. *Id.* In fact, following the defendant's arrest Ms Loudermilk found her SSI payment card. RP 125.

Later that evening Ms Loudermilk went to the Emergency Room of the local hospital for examination. RP 99-100, 121-122. Once at the ER, the treating physician noted several bruises and abrasions on her arms and a large area of swelling on her cheek. RP 99-101. According to the physician, Ms Loudermilk told him that she had been getting ready for bed earlier in the evening, that she and her boyfriend had got into an argument and that her boyfriend had punched her in the face during the argument. *Id.* A CAT scan revealed that she had an intra-orbital fracture to bones that form the floor of her eye socket. RP 100-102. However, the physician could not identify what caused the injury or when it occurred other than sometime within the preceding two days. RP 110. He did state that the eye injury was consistent with being hit. RP 104.

According to the ER physician, as part of the standard procedures at the hospital where he works Ms Loudermilk was sent to speak with a social worker after she was done in the ER. RP 91-92. This was after the doctor had finished diagnosing and treating her. *Id.* The Social Worker then interviewed Ms Loudermilk and wrote up a report which was later attached

to Ms Loudermilk's medical file. *See* Trial Exhibit No. 7.

Procedural History

By Information filed August 20, 2013, the Kitsap County Prosecutor charged the defendant Erin Thomas M. Bong with one count of second degree assault (DV). CP 1-6. The case later came on for trial before a jury with the state calling five witnesses, including Officer Prouse, the ER physician and Ms Loudermilk. RP 23-127. Prior to calling the ER Physician the state indicated that it would seek the admission of Ms Loudermilk's medical records into evidence as statements given for the purposes of medical diagnosis and treatment. RP 87-90. The defense objected that this document included statements Ms Loudermilk gave to the social worker after her treatment in the ER and that these statements were not given for the purpose of the doctor's diagnosis and treatment. RP 86-87.

Based upon this objection the state called the ER Physician in an offer of proof and he explained that as part of the procedures at the hospital where he is employed persons such as Ms Loudermilk are interviewed by a social worker following their treatment in the ER and that he was not in the room when this occurred. RP 89-90, 92. He did state that prior to testifying at trial he did pull the medical records and read what Ms Loudermilk had told the Social Worker. RP 105-106. In fact, the social worker's portion of the medical records stated:

> Discharge Planning Comments:
> 5/4/2013 0108 by PAMELA S HYSONG
> Pt comes in tonight via ambulance after being "beat" by her S/O. [----------] S/O was arrested and brought to jail. Pt has multiple injuries, and in talking to the attending physician she will most likely be d/c' tonight. Pt does not wish to go to a shelter; she wants to go home. Pt states that there is no one else there, and that she is safe at home (at least when S/O is not there). Pt states that this S/O will not be coming home, and that when he does her two brothers and her child's father will be there to ensure that she is safe. Pt states that she will allow him in the home only to get his belongings, and then to get "out." Pt denies SI/HI. Pt is given multiple resource information: YMCA-DV, Community Resource Guide, and Counseling information. Pt is also given an "Application for Benefits, "Crime Victims." Pt will c/d home when medically cleared.

Exhibit 7, page10. (the bracketed dashes indicate a sentence or sentences that have be marked over in black to make them unreadable.)

In addition to the responding officer, the ER physician and Ms Loudermilk, the state also called the 911 operator who responded to Ms Loudermilk's call. RP 68-78. This witness identified Exhibit 6 as an audio recording of that call. RP 70. The defense objected to the admission of this exhibit absent testimony from Ms. Loudermilk. RP 71-74. After Ms Loudermilk testified the court admitted this exhibit into evidence with no objection from the defense. RP 71-71. The state then played the exhibit for the jury. *Id.*

After the end of the state's case-in-chief the defense closed without calling any witnesses. RP 128, 137. The court then instructed the jury

without objection, after which the parties presented their closing arguments and the jury retired for deliberation. RP 130-134, 138, 139-164; CP 85-103.. The jury later returned a verdict of guilty, after which the court sentenced the defendant within the standard range. RP 171-172; CP 104-105, 108-118. Following imposition of sentence the defendant filed timely notice of appeal. CP 124.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION WHEN IT ADMITTED THE RECORDING OF A 911 CALL INTO EVIDENCE BECAUSE IT WAS TESTIMONIAL IN NATURE AND THE PERSON WHO PLACED THE CALL TESTIFIED THAT SHE HAD NO MEMORY OF MAKING IT.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court had occasion to reevaluate the scope of the confrontation clause under United States Constitution, Sixth Amendment, in relation to the admission of a prior hearsay statement made by a witness who did not testify in the case. In this case, the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant's wife, who was present during the incident. The defendant argued self-defense. In order to rebut this claim, the state attempted to call the defendant's wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay and violated the defendant's right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife

made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the statements bore "adequate 'indicia of reliability'".

The court granted the prosecutor's motion, ruling that the statements did qualify as "statements against penal interest," and that under *Ohio v. Roberts*, there was no confrontation violation because the statements bore sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia of reliability, but the Ohio Supreme Court disagreed and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion the Supreme Court first made an extensive review of origins of the legal principle of confrontation, noting that the "right to confront one's accusers is a concept that dates back to Roman times." The court then examined the common law origins of the right to confrontation, particularly in relation to the "infamous political trials" such as the treason trial of Sir Walter Raleigh in 1603 in which he was convicted largely upon the admission of an alleged co-conspirator's statement, in spite of Sir Walter Raleigh's call that he be confronted by his accuser. Based largely upon the abuses perceived in these trials, the common law courts recognized that in

criminal trials a defendant should be afforded the right to confront and cross-examine the witnesses called against him.

In *Crawford,* the court noted that the one exception allowed under the common law involved the admission of prior testimony given by a witness under circumstances in which the defendant was afforded the right to confrontation at the prior hearing. In this one exception, the common law found no confrontation denial in admitting the prior testimony if the witness was no longer available.

In *Crawford,* the United States Supreme Court overturned its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a "firmly rooted hearsay exception," or was given under circumstances showing it to be trustworthy. 124 S.Ct. at 1364, 1369. *Crawford* rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on the reliability of evidence. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: By testing in the crucible of cross-examination." *Id.* at 1370. Thus in *Crawford,* the court "reject[ed]" the view that the reliability-based framework of *Roberts* or the rules of evidence, govern the admissibility of out-of-court statements. The court held:

Where testimonial statements are at issue, the only indicium of

> reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: Confrontation.

124 S.Ct. at 1374.

In *Crawford* the Court did not definitively explain the scope of what "testimonial evidence" is. *Id.* at 1374 ("we leave for another day any effort to spell out a comprehensive definition of 'testimonial'"). However, the Court did set out a "core class of 'testimonial' statements," the admission of which would violate the confrontation clause without the in court testimony of the proponent." *Id.* at 1364. This "core class" of "testimonial statements" includes not only formal affidavits and confessions to police officers, but also "pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* at 1364. Thus, the "common nucleus" of the confrontation clause includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* This definition includes at its core statements elicited in response to police questioning during an investigation. *State v. Walker*, 129 Wn.App. 258, 268, 118 P.3d 935 (2005); *see also State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) (Domestic violence victim's statements in response to police questioning are testimonial for purposes of confrontation under the Sixth Amendment).

In the case at bar a careful review of the audio version of the 911 call (Exhibit No. 6), the transcript of the 911 call (Trial Exhibit No. 7) and Ms Loudermilk's testimony at trial reveals that her 911 call was far from a call for rescue. Rather, Melody Loudermilk's statements during the 911 call are much better characterized as a call for assistance in arresting the defendant. In fact, during the call she informs the 911 operator that the defendant knew that she was calling 911 and she was worried that he was going to leave with her money before the police arrived. In response the 911 operator had Ms Loudermilk give a description of the defendant's vehicle so he could be apprehended if he did leave. Another fact is also highly supportive of the conclusion that Ms Loudermilk's 911 call was testimonial. That fact is that the 911 operator terminated the call prior to the arrival of the police and told Ms Loudermilk to call back if there were any problems.

Since Ms Loudermilk's 911 call was testimonial in nature, its admission absent the testimony of Ms Loudermilk violated the defendant's right to confrontation under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22. The state may argue that there was no violation of the right to confrontation because the state did call Ms Loudermilk as a witness. While it is factually correct that the state called her as a witness the conclusion that the defendant was given his right to confrontation does not follow under the facts of this case because she did not

testify concerning the substance of the 911 call. In fact she testified that she had no memory of making the call or the substance of the call. Thus, for the purpose of the admission of the 911 call, the claim that she testified is illusory. An apt comparison exists in our case law under the child hearsay statute in RCW 9A.44.120. The following examines these cases.

Under RCW 9A.44.120, a witness may be allowed to testify to statements describing acts of sexual or physical abuse a child under 10-years-old made to the witness in spite of the hearsay rule if certain criteria are met. This first portion of this statute states:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

RCW 9A.44.120 (in part).

At this point, the statute sets two specific criteria that the state must prove in order for a statement to be admissible under RCW 9A.44.120. These criteria are as follows:

> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120 (in part).

Finally, the statute creates a notice requirement as a condition precedent for admitting statements under this statute. This condition precedent states:

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

RCW 9A.44.120 (in part).

Taken together, this statute creates seven requirements for the admissibility of testimony under RCW 9A.44.120. They are:

(1) The statement to which the witness testifies must be made by a child under age ten,

(2) The statement must be one "describing" an "act of sexual contact performed with or on the child" or "act of physical abuse on the child by another that results in substantial bodily harm,"

(3) The court must hold a hearing "outside the presence of the jury" on the admissibility of the statements,

(4) The court must find that the "time, content, and circumstances of the statement" provide "sufficient indicia of reliability" to admit the statement,

(5) The child must testify at the hearing, or if legally

"unavailable," there must be "corroborative evidence of the act,"

(6) The state must give the defense notice of both the "intention to offer the statement" as well as notice of the "partriculars of the statement," and

(7) The state must give the defense the required notice "sufficiently in advance of the proceedings" to provide the defense with "a fair opportunity to prepare to meet the statement."

RCW 9A.44.120.

Statements of abuse to a third party are not admissible under this statute unless the state complies with each and every one of these requirements. *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

In *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997), the court addressed the issue of what it means under the statute and the confrontation clause for the witness to "testify" prior to the admission of extra-judicial statements into a trial. In this case the defendant had appealed his conviction for two counts of first degree rape of a child and two counts of first degree child molestation against his nine-years-old step-daughter, arguing that the trial court had erred when it allowed testimony under RCW 9A.44.120 because the complaining witness did not testify concerning the alleged acts of sexual abuse. She did take the stand, but the state never asked her any questions about her claims of abuse. The court of appeals agreed with the defendant's argument, holding that in order for RCW 9A.44.120 to meet the minimum requirement of the confrontation clause, the term "testifies" means

live, in-court testimony concerning the specific allegations of abuse. The Washington Supreme Court later affirmed this ruling, holding as follows:

> The Confrontation Clause requires the term "testifies," as used in the child hearsay statute, RCW 9A.44.120(2)(a), to mean the child gives live, in-court testimony describing the acts of sexual contact to be offered as hearsay. Because the child here did not testify as required yet was available to do so, her hearsay statements were inadmissible under RCW 9A.44.120. We affirm the Court of Appeals' reversal of defendant's conviction and remand for further proceedings.

State v. Rohrich, 132 Wn.2d at 480 (footnote omitted).

The same standard should exist in the admission of testimonial statements made as part of a 911 call. Since it is testimony concerning the making of and the substance of the 911 call is what actually satisfies the confrontation requirement, putting a witness on the stand who disavows any knowledge concerning the making or substance of the call no more meets the requirements of confrontation than did calling the witness in *Rohrich*. Thus, in the case at bar, the trial court erred when it admitted the 911 call into evidence.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not "harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would

have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). In the case at bar, a review of the evidence at trial indicates that the state cannot meet this burden. In fact, the 911 call was the only evidence at trial that proved the existence of a crime, much less that the defendant was the perpetrator. Thus, the defendant is entitled to a new trial.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED A MEDICAL RECORD INTO EVIDENCE UNDER ER 803(a)(4) BECAUSE IT CONTAINED STATEMENTS NOT MADE FOR THE PURPOSE OF MEDICAL DIAGNOSIS.

Under ER 801(c) hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under ER 802 hearsay is "not admissible except as provided by these rules, by other court rules, or by statute." One of these exceptions is found in ER 803(a)(4), which allows the admission over a hearsay exception of a "Statement for Purposes of Medical Diagnosis or Treatment." The following examines this hearsay exception.

Under ER 803(a)(4) statements made for the purpose of medical diagnosis or treatment are considered an exception to the hearsay rule. This rule states:

> **(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

> (4) *Statement for Purposes of Medical Diagnosis.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

Traditionally, this exception "applies only to statements 'reasonably pertinent to diagnosis or treatment.' Thus, statements as to causation ("I was hit by a car") would normally be allowed under this exception, while statements as to fault (". . . which ran a red light") would not. 5A K. Tegland, *Washington Practice* § 367 at 224 (2d ed. 1982).

However, over the last few decades, the courts of this state have carved out an exception which allows a health care provider, under appropriate circumstances, to testify to a child's identification of the perpetrator of a crime against the child and a child's description of the alleged abuse. In a 1993 case, Division I of the Court of Appeals described this exception as follows:

> ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. Normally, such testimony is not admissible if it identifies the perpetrator of a crime, but an exception has arisen to this rule when the victim is a child. *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505, *review denied*, 112 Wn.2d 1014 (1989).

In *Butler*, this court examined at length the purposes of ER

> 803(a)(4) and the times when hearsay evidence concerning the identity of the perpetrator of a crime can be admitted when the victim is a child. This court ruled that such statements could be admitted as part of the doctor's testimony regarding medical treatment if the information was necessary for diagnosis and treatment. In ruling that the incriminating identification was necessary for diagnosis and treatment in that case, we reasoned that, in abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child's home. *Butler*, 53 Wn.App. at 222-23, 766 P.2d 505; *see also In re Dependency of S.S.*, 61 Wn.App. 488, 503, 814 P.2d 204, *review denied*, 117 Wn.2d 1011, 816 P.2d 1224 (1991).

State v. Ashcraft, 71 Wn.App. 444, 456. 859 P.2d 60 (1993).

As is apparent from the court's comments in *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505 (1989), and *Ashcraft*, the justification for allowing a treatment provider to testify to the child's identification of the alleged perpetrator of abuse lies within the court's belief that part of the treatment provider's duty and function is to identify the abuser, thereby allowing the treatment provider to gauge what type of psychological damage occurred, what type of treatment is necessary, and what steps will be necessary to prevent future abuse. As such, the courts have held that these statements, in the context of child abuse cases, fall generally within the category of those made "for the purpose of diagnosis or treatment."

By contrast, in the case at bar the court was not addressing the scenario of a child having made claims of abuse to a treating physician. Rather, in the case at bar the court admitted statements that the complaining

witness made to a social worker at the hospital, statements made outside the knowledge of the treating physician. These statements were as follows:

> Discharge Planning Comments:
> 5/4/2013 0108 by PAMELA S HYSONG
> Pt comes in tonight via ambulance after being "beat" by her S/O. [----------] S/O was arrested and brought to jail. Pt has multiple injuries, and in talking to the attending physician she will most likely be d/c' tonight. Pt does not wish to go to a shelter; she wants to go home. Pt states that there is no one else there, and that she is safe at home (at least when S/O is not there). Pt states that this S/O will not be coming home, and that when he does her two brothers and her child's father will be there to ensure that she is safe. Pt states that she will allow him in the home only to get his belongings, and then to get "out." Pt denies SI/HI. Pt is given multiple resource information: YMCA-DV, Community Resource Guide, and Counseling information. Pt is also given an "Application for Benefits, "Crime Victims." Pt will c/d home when medically cleared.

Exhibit 7, page10. (the bracketed dashes indicate a sentence or sentences that have been marked over in black to make them unreadable.)

Since these statements were not made as part of treatment or diagnosis and were only reviewed by the treating physician to prepare for his testimony, they do not qualify for admission in to evidence under the ER 803(a)(4) hearsay exception for statements made for the purpose of medical diagnosis or treatment. Thus, the trial court erred when it admitted this portion of medical records. In this case a review of the evidence presented at trial leads to the conclusion that this error prejudiced the defendant. This conclusion flows from the following facts: (1) the only direct claim of an

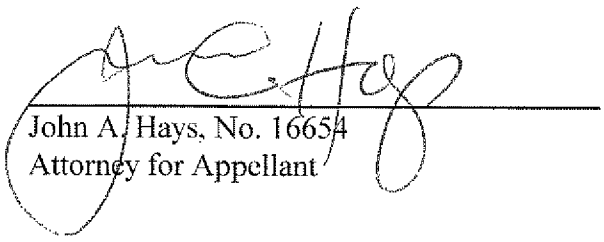
assault that was admitted at trial came through the 911 call, (2) the ER physician could not state that the injuries he saw on Ms Loudermilk had happened that evening, (3) Ms Loudermilk's claims that the defendant had taken her Social Security Payment card turned out to be false, and (4) Ms Loudermilk regularly took medications that were contraindicated to alcohol and she was drinking on the night in question. Under this evidence it is likely that the jury would have acquitted absent the admission and playing of the 911 tape. Thus, the erroneous admission of this evidence entitles the defendant to a new trial.

CONCLUSION

Appellant respectfully argues that this court should reverse the defendant's conviction and remand for a new trial based upon the arguments contained herein.

DATED this 28th day of May, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ER 803(a)(4)

(a) *Specific Exceptions*. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(4) *Statements for Purposes of Medical Diagnosis or Treatment*. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **ERIN THOMAS M. BONG,** **Appellant.**	**NO. 45602-8-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Russell D. Hauge
   Kitsap County Prosecuting Attorney
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   kcpa@co.kitsap.wa.us

2. Erin Thomas Mitchell Bong
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Dated this 28th day of May, 2014, at Longview, Washington.

Diane C. Hays

HAYS LAW OFFICE

May 28, 2014 - 3:37 PM

Transmittal Letter

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Court of Appeals Case Number: 45602-8

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